OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 07-27 **December 27, 2006**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Non-Board Settlements

Settlements are vital to effectuating the Act. While Regions should always seek to obtain an informal or, where appropriate, a formal settlement agreement, non-Board adjustments, which are agreements between the parties that result in the withdrawal of the charge, have always been an important settlement tool. In the past few years, in fact, the percentage of non-Board adjustments has been growing. For FY 2006, about 80 percent of the Agency's pre-complaint settlements and about 46 percent of the post-complaint settlements were non-Board adjustments.[1] During the period FY 2003 to FY 2006, the percent of non-Board adjustments grew by about 10 percent.[2] In view of the prominence of non-Board adjustments in the settlement universe, Regions should follow the principles set forth in this memorandum to ensure that non-Board adjustments comply with all applicable standards and consistent review standards are applied by all Regions.[3]

In *Independent Stave Co.*, 287 NLRB 740 (1987), the Board reconfirmed that the Board's jurisdiction over settlement agreements requires it to enforce public interests, not private rights, and to reject private settlements that are repugnant to the Act or Board policy. Id. at 741. At the same time, the Board

[1] For FY 2003, about 74 percent of pre-complaint settlements and about 39 percent of post-complaint settlements were non-Board adjustments. For FY 2004, 75 percent of pre-complaint settlements and about 42 percent of post-complaint settlements were non-Board adjustments. For FY 2005, 81 percent of pre-complaint settlements and about 46 percent of post-complaint settlements were non-Board adjustments.

[2] In FY 2003, non-Board adjustments represented about 59 percent of total settlements. In FY 2004, 2005 and 2006, those figures were about 62, 70 and 70 percent, respectively.

[3] The work of the Quality Committee in the preparation of this memorandum is acknowledged. Members of this Committee are Rosemary Pye, RD, R-1; Rochelle Kentov, RD, R-12; Martha Kinard, RD, R-16; Robert W. Chester, RD, R-18; Karen Fernbach, RA, R-2; Dorothy D. Wilson, RA, R-26; Claude T. Harrell, ARD, R-10; Andrew Young, SCO, R-32; James G. Paulsen, AGC, Operations-Management.; and Charles L. Posner, DAGC, Operations-Management. The assistance of Gerald Kobell, RD, R-6, is also acknowledged.

also acknowledged its policy of encouraging settlement agreements. Based on its historical treatment of non-Board adjustments, the Board identified a non-exclusive list of factors to consider: (1) whether the settlement is reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; (2) whether the charging party, the respondent, and the discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (3) whether fraud, coercion, or duress were present; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. Id. at 743. Agency policy with respect to non-Board adjustments also appears at Casehandling Manual (CHM) Sections 10140 through 10142.5.

Although the General Counsel has considerable discretion in approving non-Board adjustments, it is essential that the Regions reject settlements that are repugnant to Board law and policy. Presently, there is no explicit Agency-wide policy regarding the inclusion of broad waivers, releases, and confidentiality clauses in non-Board adjustments.[4] These types of provisions, which also often resolve other actual and potential claims, are appearing with increasing frequency in non-Board adjustments. Because of the significant impact these provisions may have on Section 7 rights and because they are appearing with increased frequency in non-Board adjustments, it is necessary for the General Counsel to adopt core standards on these issues. This is particularly true because law firms, employers, and unions appear before multiple Regions. If these policy standards are known to the staff and the public in advance of the negotiation of the non-Board adjustments, it is less likely that the parties will present the Regions with non-Board adjustments that are repugnant to the Act or are otherwise unacceptable to the Regions. It is easier to maintain standards publicized in advance than to undo settlements that have already been reached, particularly when those settlements represent a complex balancing of interests.

To exercise proper review,[5] the Board agent should obtain the terms of the non-Board adjustment in writing.[6] The Board agent should also obtain the

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[4] Section 10142 of the CHM states: "In those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in private negotiations." In addition, Section 10564.8 of the CHM provides that a Region must seek approval from Operations-Management to accept a settlement, including a non-Board settlement, that appears to provide "for more than 100 percent backpay as an inducement to discriminatees to waive reinstatement."

[5] In the review of non-Board adjustments, it is appropriate to differentiate between cases where there is only the potential for a determination of merit and cases where complaint has already been authorized. Although Regions should always reject settlements that are repugnant to Board law and policy, there should be closer scrutiny of cases where a merit determination has already been made.

[6] See CHM Section 10120.4, which requires obtaining the details of an adjusted withdrawal.

position of any alleged discriminatees and any other individuals or entities who may be adversely affected by approval of the request for withdrawal of the charge. It is not necessary to determine the position of the charged party.[7]

While the Region must know the basis upon which to consider the withdrawal of a charge, there is a delicate balance between making comments about the acceptability of certain proposals in a settlement and negotiating an agreement on behalf of the charging party. Thus, when a Board agent learns that the parties are negotiating what is clearly a non-Board settlement it is essential that the agent make clear that the Agency will not be a party to a non-Board adjustment, that the Agency is not endorsing the non-Board settlement and that the agent's comments are limited to addressing the issue of whether the Regional Director will approve a withdrawal based on the settlement. It should also be made clear that the Agency cannot enforce the terms of a non-Board adjustment in the event of noncompliance.

To develop core standards, we have identified the following, non-exhaustive concerns about clauses that arise frequently in non-Board adjustment situations: (1) waiver of the right to file NLRB charges on future unfair labor practices and on future employment; (2) waiver of the right to assist other employees in the investigation and trial of NLRB cases; (3) confidentiality clauses and clauses that prohibit an employee from engaging in non-defamatory talk about the employer; (4) penalties for breach of agreement requiring the return of backpay and assessing costs and attorneys' fees; and (5) the tax treatment of settlement payments.

(1) <u>Waiver of the Right to File NLRB Charges on Future Unfair Labor Practices and on Future Employment</u>

Generally, the Board has held that an employer violates the Act when it insists that employees waive a statutory right to file charges with the Board.[8] On the other hand, an employer does not violate the Act when, in exchange for sufficient consideration, such as backpay, the employer insists that a discriminatee sign a release waiving claims arising prior to the date of the execution of the release.[9]

While the release of future rights raises serious questions about an employee's future access to the Board, a party has a legitimate interest in settling the current claims filed against it. However, there is no legitimate interest in limiting an employee's rights with respect to matters arising after the execution of

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[7] See CHM Section 10120.6 on obtaining the positions of the parties.

[8] See, e.g., *Athey Products Corp.*, 303 NLRB 92, 96 (l991).

[9] See, e.g., *First National Supermarket*, 302 NLRB 727 (l991).

the release. An employee is not in a position to evaluate whether the compensation being received as part of the settlement is of fair value when compared to the rights that he/she is being asked to waive. When the parties to a case reach a non-Board adjustment, a Regional Director plays a critically important role in deciding whether approval of a withdrawal request will effectuate the purposes of the Act. If the non-Board adjustment contains a release that waives future rights, i.e., rights that do not predate the execution of the release, a Regional Director should inform the parties that such a release of future rights will prevent the Director from approving the withdrawal request because such a waiver of future rights would unlawfully preclude an employee from having access to the Board with respect to unknown future unlawful conduct. Generally, Regional Office experience has shown that when this issue has been raised with the parties to a non-Board adjustment, the parties will adjust the language so that any waiver of future rights is deleted from the release. This practice is critically important to protecting the statutory right of employees to have access to and file charges with the Board.

One exception to the rule of prohibiting waivers of future rights is a release in which an employee gives up his right to seek future employment with the employer with whom he/she is signing a release resolving current claims. Such a waiver clearly involves releasing future rights, but it does not squarely implicate the right to file a charge with the Board. While the waiver of these future employment rights should be discouraged, the employee is in a position to evaluate whether he/she wishes to give up his right to work for the employer in the future.

In such circumstances, however, if the employee-party to the non-Board adjustment is not represented by counsel, the Region should ask the employee whether he understands the implications of the waiver of future employment rights and wishes to waive this particular future right. In some circumstances, a future employment waiver may become a serious impediment to an employee if the employer involved in the case operates in different locations and the employer would be the most frequent source of the employee's employment opportunities. Also, the release may include affiliated, subsidiary and successor employers and the employee may not understand the implications of such a waiver. Therefore, while a Board agent acts in the public interest and is not a representative of an individual discriminatee, the Regional Director should ensure that an unrepresented employee is aware of what he or she is giving up by signing a waiver releasing the right to seek future employment with the named employer.

(2) <u>Waiver of Right to Assist Other Employees in the Investigation and Trial of NLRB Cases</u>

Similar to the waiver of future rights, a settlement agreement that limits a discriminatee's ability to assist other employees by, for example, giving testimony

or providing evidence in support of a fellow employee, implicates critical statutory rights. A provision that restricts a discriminatee from providing assistance to other employees limits not just the Section 7 rights of that discriminatee but the Section 7 rights of other employees who are not receiving compensation under the terms of the non-Board adjustment. As such, this type of provision clearly infringes on fundamental rights under the National Labor Relations Act and should not be permitted.

(3) Confidentiality Clauses and Clauses that Prohibit an Employee from Engaging in Non-defamatory Talk about the Employer

Non-Board adjustments that contain clauses that prohibit discriminatees from generally disclosing the financial terms of a settlement continue to be appropriate. Thus, confidentiality clauses that prohibit an employee from disclosing the financial terms of the settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable. However, any prohibition that goes beyond the disclosure of the financial terms should not be approved, absent compelling circumstances. If such circumstances exist, details of these circumstances must be documented in the file. Further, any document recommending approval of the withdrawal request containing such a clause must explain why approval is warranted.

Similar to an overly broad confidentiality clause, non-Board adjustments that limit a discriminatee's ability to engage in discussions with other employees that include non-defamatory statements about the employer severely limits an employee's right to engage in concerted protected speech. Such a restriction on the Section 7 rights of an employee is repugnant to the purposes and policies of the Act. Therefore, Regions should not approve a withdrawal request where the non-Board adjustment prohibits the discriminatee from engaging in non-defamatory speech about the employer.

(4) Penalties for Breach of Agreement Requiring the Return of Backpay and Assessing Costs and Attorneys' Fees

Increasingly, counsels for charged parties are including in non-Board adjustments unduly harsh penalties in the event the charging party or discriminatee breaches the agreement in any way. Such penalties often include the immediate return of backpay, frequently with interest. They often also provide that in the event of a breach, the charging party or discriminatee must pay all costs and expenses, including attorneys' fees, if the charged party files suit to enforce the terms of the agreement, or incurs damages or expenses by virtue of its having to defend itself against new charges that were prohibited by the agreement.

Although charged parties argue that such penalties are necessary to ensure that the charging party and discriminatees adhere to the agreement, inclusion of such penalties is inappropriate. Non-Board adjustments sometimes

contain vaguely worded and/or overly expansive language and the issue of whether they have been breached may be subject to interpretation and unnecessary and costly post settlement litigation. Consequently, inclusion of such penalties may inhibit charging parties and discriminatees from engaging in otherwise legitimate, protected activity because of fear that such activity might be construed as violating the agreement, resulting in severe financial consequences. That inhibition is clearly contrary to the public interest and to the purposes and policies of the Act. However, a provision that seeks damages that are directly related to the breach of the agreement would not be considered an unduly harsh penalty.

(5) Tax Treatment of Settlement Payments

The Act provides for remedial backpay and interest to make whole losses caused by unlawful conduct. Long-established policy provides that backpay paid as the result of an unfair labor practice proceeding be treated as wages for tax purposes, and that interest be treated as non-wage taxable income. See CHM 10637. This policy is consistent with U.S. tax law and regulations.

Regions are consistently obtaining backpay and interest paid in informal settlement agreements and formal compliance cases in a manner that correctly meets tax requirements. As a result of correctly classifying backpay, appropriate amounts are withheld for income and social security taxes. In approving non-Board adjustments, Regions should not allow parties to avoid proper tax treatment of settlement payments. For example, the parties may claim that the settlement payment is non-wage income or liquidated damages or otherwise not subject to taxation or withholding. Regions have broad discretion to approve non-Board adjustments, particularly when proposed by the parties before a Regional determination of a pending charge. Nonetheless, approval of a settlement that claims monetary amounts to be non-taxable when they are clearly in lieu of wages is inconsistent with the Agency's responsibility to correctly apply federal laws.

Regions should routinely confirm with the parties how settlement payments will be treated for tax purposes in proposed non-Board adjustments. Whenever the parties propose to treat settlement payments as anything other than wages and interest, or to report payments in a manner that appears to be inappropriate for tax purposes, Regions should advise the parties that backpay awards in unfair labor practice proceedings should be treated as wages and interest, and reported in accordance with the requirements of federal, state, and local tax requirements, including, in particular, making Social Security (FICA) contributions and payroll tax deductions from any wage payments.

The parties should also be advised that although interest is to be paid in addition to backpay, allocation of a settlement payment between backpay and interest should be based upon a reasonable assessment of interest due on

backpay, and not skewed toward interest as a means of reducing taxes and withholding.

Finally, Regions should advise all parties to a non-Board adjustment that although the Region has no authority to determine proper taxes on settlement payments or otherwise enforce tax obligations, the parties are responsible to tax agencies with regard to reporting and tax treatment of settlement payments.

Although a Region's decision to approve the withdrawal of an unfair labor practice charge as the result of a non-Board adjustment will depend upon all circumstances, Regions should generally refuse to approve a withdrawal request if the parties have clearly failed to treat the monetary remedy properly for tax purposes.

Summary of Principles

In summary:

1. Regions should not approve non-Board adjustments that include a provision requiring an employee to release future rights, with the exception that an employee may knowingly waive the right to seek employment with a named employer in the future.
2. Regions should not approve non-Board adjustments that prohibit a discriminatee from providing assistance to other employees.
3. Absent special circumstances, Regions should not approve a withdrawal request based on a non-Board adjustment that prohibits a discriminatee from engaging in discussions about the employer or the terms of the settlement with other employees, except that defamatory statements my be prohibited. However, the non-Board adjustment may contain a provision limiting the disclosure of the amount of money received pursuant to the terms of the non-Board adjustment.
4. Non-Board adjustments should not include language that specifies unduly harsh penalties for breach of the agreement such as repayment of backpay or a requirement that the charging party or discriminatee pay attorneys' fees or costs for enforcing the agreement. A provision that seeks damages that are directly related to the breach of the agreement would not be considered an unduly harsh penalty.
5. Regions should refuse to approve a withdrawal request based on a non-Board adjustment that appears to violate tax laws or regulations.

Conclusion

Approving withdrawals in a non-Board adjustment often presents difficult choices for a Region, particularly if the non-Board adjustment includes some of the issues described in this memorandum. The final judgment must be left to the Regional Director to determine whether it is more appropriate, within these guidelines, to approve the withdrawal or to proceed to trial with an uncooperative charging party or witnesses. Therefore, Regional Directors have the discretion to consider and apply these core standards, and, if appropriate, consult with Operations-Management, and to exercise their best judgment in deciding whether to approve the withdrawal request and accept the non-Board adjustment.

If you have any questions regarding this memorandum, please contact your AGC or Deputy or the undersigned.

/s/
R.A.S.

cc: NLRBU
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